

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-181091

DATE: July 10, 1974

40925

95265

MATTER OF: Arista Co.

- DIGEST:
1. Contention that determination made by contracting officer that low bidder is not manufacturer of firing switch assemblies being procured within meaning of Walsh-Healey Act is based upon erroneous preaward surveys and that date of notification to procurement agency of final determination by Department of Labor coincided with date of award, are not for consideration since jurisdiction as to these matters rests with Department of Labor subject to judicial review.
 2. Contention that procuring activity failed to provide low bidder with copies of preaward survey thereby denying it the opportunity to intelligently reply has no merit since our Office, upon approval of procuring activity, has provided bidder with copies which can be utilized in possible appeal to Department of Labor. If protester requires additional information procedure set forth in ASPR 1-329 providing for requests directly to procurement activity should be followed.

Invitation for bids N00104-74-B-0425 was issued by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania, for the procurement of firing switch assemblies.

The contracting officer determined that Arista Co. was ineligible for award because it did not qualify as a manufacturer under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35-45, as implemented by Armed Services Procurement Regulation (ASPR) 12-603.1. The contracting officer informed Arista of his determination and Arista was provided with an opportunity to protest this finding. The contracting officer's determination, along with additional information submitted by Arista was forwarded to the Department of Labor for review and was sustained by the Department of Labor.

Arista contends that: (1) the determination of ineligibility for award of the subject contract is based upon erroneous preaward

survey reports; (2) the notification by the procuring activity of the final determination by the Department of Labor on the same date upon which award was made prevented Arista from "properly pursuing the matter;" and (3) the procuring activity failed to provide Arista with copies of the preaward surveys thereby denying that firm the opportunity to intelligently reply.

A decision by our Office addressing the first two contentions raised by Arista would, in effect, be one which would affect a determination with respect to the "manufacturer" status of the bidder and, more generally, the administration of the Walsh-Healey Act. In our view, the determination whether a contractor is or is not a manufacturer within the meaning of the Act has been vested by the Congress in the Department of Labor. The Walsh-Healey Act provides that, with certain exceptions not here material, every contract exceeding \$10,000 in amount entered into by any Government agency for the procurement of supplies shall contain a stipulation that the contractor is a manufacturer of or regular dealer in such supplies. The Act places no responsibility or authority in our Office concerning the administration of the Act. The responsibility of administering the provisions of the Act and the authority to prescribe rules and regulations, to conduct hearings, and to make findings of fact and decisions thereon necessary to enforce the provisions of the Act are placed specially in the Secretary of Labor. In implementation of the Act, the Department of Labor has published the "Walsh-Healey Public Contracts Act Rulings and Interpretations No. 3." Section 29 of the Rulings and Interpretations provides:

"The responsibility of determining whether or not a bidder is qualified as a manufacturer or as a regular dealer under the Public Contracts Act rests in the first instance with the contracting agency. However, any decision which the contracting officer might make is subject to review by the Department of Labor which is charged with the administration of the Act. The Department of Labor may determine the qualifications of a bidder in the first instance in the absence of any decision by the contracting officer."

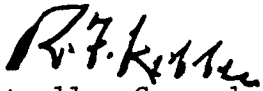
In view of section 29, in B-179509, B-179518, November 6, 1973, our Office stated:

"Thus, responsibility for applying the criteria of the Walsh-Healey Act is vested in the contracting officer and the Department of Labor. Our Office is not authorized to review determinations as to whether particular firms are regular dealers or manufacturers within the purview of the Walsh-Healey Act and we have denied jurisdiction in this area because such determinations rest with the contracting officer subject to final review by Labor. B-173808, October 26, 1971; B-173298, August 3, 1971; B-171426, April 27, 1971; B-166905, July 24, 1969."

Further, section 5 of the Walsh-Healey Act, 41 U.S.C. 39, provides for a hearing by the Secretary of Labor, or a representative designated by him, for "any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving the provisions" of the Act. Additionally, section 10(c) of the Act, 41 U.S.C. 43a(c), provides that "any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to * * * the interpretation of * * * manufacturer." See also City Chemical Corporation v. Shreffler, 333 F. Supp. 46 (1971).

With regard to Arista's contention concerning the failure of the procurement activity to provide that firm with copies of the preaward surveys thereby denying that firm the opportunity to intelligently reply, it should be noted that our Office, after obtaining approval from the procuring activity, and pursuant to section 20.7 of our Interim Bid Protest Procedures and Standards, provided Arista with a copy of the administrative report submitted in conjunction with the protest. This report included copies of the preaward surveys of Arista and can be utilized by Arista in any appeal to the Department of Labor. If any additional documentation is desired, Arista should request these documents directly from the procuring activity, as provided in ASPR 1-329, as implemented by Department of Defense (DOD) Directive 5400.7.

In view of the foregoing, no further action will be taken by our Office in connection with Arista's protest.


Deputy Comptroller General
of the United States